MICHIGAN SUPREME COURT

PUBLIC HEARING
JANUARY 27, 2005

JUSTICE CAVANAGH: Good morning, ladies and gentlemen. Welcome to the Court's January public hearing. We have a number of administrative items on the agenda but speakers listed for a select few of those. I'll go through the agenda in order. Item 1: Administrative matter 2004-53 deals with amendment of Rules 9.124 and 9.126 of the Michigan Court Rules. I have nobody endorsed for comments. Is there anybody hear in regard to Item 1? All right, that item will be considered submitted for further consideration.

Item 2 is 2004-43 relating to amendment of Rule 7.204 of the Michigan Court Rules. The Court has received some comments but no speakers apparently have registered to address. Is there anybody here in relation to that matter? All right, that matter will be submitted.

ITEM 3: 2004-37, RETENTION OF MCR 7.217 AMENDMENT

JUSTICE CAVANAGH: Item 3 is 2004-37 dealing with an amendment of Rule 7.217(D) of the Michigan Court Rules. Deal with the Michigan court rules that prohibited the Court of Appeals clerk from accepting untimely motions for reinstatement of an appeal that is involuntarily dismissed for lack of prosecution and my records indicate we have 3 individuals endorsed to speak. Mr. Mark Cooney from Cooley Law School.

MR. COONEY: Good morning. I am here on behalf of the appellate practice section this morning and the section's hope is that the Court will opt not to retain this amendment to the rule. Our position is that it robs the Court of Appeals of the discretion to even consider the basis for a late motion for reinstatement. It doesn't even let it in the door and we think it's better process so to speak to let it in the door and let the court at least consider the stated reasons for the delay and we recognize that in the vast majority there will probably not be a sufficient basis to excuse that delay. Nevertheless we'd like the court to make that decision. I think we're talking about relatively small numbers here. I don't have the exact statistics on how many of these motions are filed but we don't think it will be an undue burden on the court to consider those perhaps on the administrative motion docket. I notice in the comments for this amendment that it indicates that there was a desire for consistency. The current rule is that the Court of Appeals will not accept a late motion for reconsideration and we believe that there are some significant distinctions between a late motion for reconsideration and a late motion to reinstate an appeal that has been dismissed involuntarily. Somebody who is filing a motion for reconsideration has already had the proverbial bite at the apple. They are

looking for a second bite at the appellate apple so to speak. Situation where somebody is moving to reinstate an appeal that has been dismissed, they have not gotten before the court yet. They have not had their day in court so we think that's an important distinction. The level of potential hardship is very different and again just the sheer numbers. We know how common motions for reconsideration are. I'm assuming that the late motions for reconsideration or the potential for late motions for reconsideration would impose a much greater burden on the Court of Appeals than would the relatively rare motion for reinstatement that comes in late. So just to sum up we'd like the Court to decide whether there is a sufficient basis for the late motion to reinstate, recognizing that maybe there is only 1 in 100 cases where the court may find reasons that are sufficiently compelling or extraordinary to allow that dismissed appeal to be revived.

JUSTICE YOUNG: Do you know what the current procedure is that the Court of Appeals uses before it issues an involuntary dismissal order for lack of prosecution.

MR. COONEY: I only see what's in the rules and the internal operating procedures which is that there has been a failure to conform to the court rules, failure to file a brief. There have been failings to be sure at that point.

JUSTICE YOUNG: Do you know whether they hold a hearing and notice the attorney?

MR. COONEY: There is notice given to the attorney. I think that the Court of Appeals does go through steps to give notice to the attorneys of the deficiencies and that they need to be corrected and that it would have to be some significant major failing by the attorney of record--

JUSTICE YOUNG: I think when I was on the court we actually had what we called the bottom feeder panel where we called the defaulting lawyers in to appear before us before these things were issued, these involuntary--what you're talking about is somebody who is rather studiously failing to file the papers.

MR. COONEY: That's correct and I think when we envision the type of extraordinary situation where there might be some sufficient basis to a late motion for reinstatement to convince the Court of Appeals to revive the appeal, I think we're envisioning a situation where perhaps a successor attorney comes in to try to pick up the pieces and help out the litigant, the party who has lost the appeal. If they can't get it before the court, the party has lost access to the appellate system and the only possible remedy against the attorney that dropped the ball, the predecessor attorney, might be a legal malpractice claim which would be a very difficult road for the client.

JUSTICE YOUNG: Not if the Court of Appeals has gone through the same process as it used to, with all these notices and (inaudible) the attorney come before them and explain why they haven't filed their papers.

JUSTICE KELLY: They would have to show a likelihood of success on the merits, wouldn't they?

MR. COONEY: They have to prove the so-called case within the case. Again we recognize that it may be a very rare situation where the Court of Appeals would see fit to grant the late motion for reinstatement but still we think it is better process to leave the doors to the courthouse open.

JUSTICE CAVANAGH: All right, thank you Mr. Cooney. Mr. Brian Shannon.

MR. SHANNON: Good morning. I'm just here to tell a short story about a case I had once that involved this situation but first I want to take a crack at your question, Justice Young. These are administrative orders. There is almost no court involvement. The attorney gets 21 days. A notice if they failed to file a brief and in due course orders are written up for one judge to sign, not a panel, and it's signed and case is dismissed. That's how it happens. The story I have to tell is back when there was a 56-day period that you could seek reinstatement in, which was still a year and a half ago. I was asked in a criminal case to try and get an appeal reinstated in these circumstances. The attorney, a veteran appellate attorney for many, many years in this court had had a mental breakdown and had become so depressed that he wasn't opening his mail anymore. He got the notice, he didn't see it, the appeal was dismissed, he didn't know. The client would call him, he would say the brief is almost done. He would make appointments to meet with him but he wouldn't meet with him and by about the time that 56 days expired he was institutionalized and receiving electroshock therapy. The client finally went to another lawyer, it got to me, and I asked the court with about an inch of medical records attached, to vacate the other dismissal order and reinstate the appeal because it wasn't the client's fault. The same disease that made the attorney unable to write the brief made him hide the problem from himself, from the client, from everybody else, until the 56 days had expired. Now of course it's going to be a shorter time. I agree with everything Mark said. This should not be a jurisdictional bar which is what it is if you say the clerk can't take the papers. There is a rule, 7.216(B) that lets the court excuse all non-jurisdictionally late times if it is so moved. There won't be very many of these--once every year or two or three, but you shouldn't tie the court's hands so it can't do justice. Thank you.

JUSTICE CAVANAGH: Thank you Mr. Shannon. Ms. Sandra Schultz Mengel, clerk of the Court of Appeals.

MS. MENGEL: Good morning. I'm here to speak in support of the continued retention of this rule. We asked for it because we did want there to be symmetry between motions for reconsideration and motions for reinstatement. Under the circumstances of most of these cases they have been pending for close to 10 months at the time they're dismissed. The dismissal process does involve a warning letter, a 21-day period during which the missing document, which generally is a brief, can be filed. Then there is a submission to an administrative motion docket and the order is entered. And then there is a 21-day period for filing a motion for reinstatement. If it is permitted that motions can be filed after that, it is certainly true as Mr. Cooney and Mr. Shannon have argued that the court would have the opportunity to review the situation but I think our concern is that generally speaking the attorney has had, in terms of a bite at the apple, perhaps not a bite at the merits, but they have certainly had an extended period of time in which to pursue an appeal that they filed and to the extent that they have neglected to do that there needs to be finality and the finality would be the 21 days.

JUSTICE KELLY: Is this a big problem or is the motivator here for this rule change in the interest of symmetry.

MS. MENGEL: Well I hate to elevate form over substance. It's not an enormous problem. It is in the interest of I think fair warning to lawyers that you can't just keep extending and ignoring deadlines and then expect to walk back in even after a dismissal and ask for reinstatement late. That there is an end to this situation and there is an appeal. And I'm aware of the case about which Mr. Shannon spoke and it's true that that was an exceedingly difficult situation, certainly for the client to have done anything more. It didn't appear that there was any more that client could have done. So perhaps if it's going to be viewed as jurisdictional that we would not be allowed to accept motions for reinstatement and there would be no means by which we could accept motions under 7.216, then there is an issue. It would be argued that we would take the motion under 7.216 and review it in any event. But that would be where (inaudible) breakdown, I suspect.

JUSTICE YOUNG: There is an exception to this rule?

MS. MENGEL: It would not necessarily be a motion for reinstatement. It would be, for instance what Mr. Shannon filed was a motion to vacate or amend.

JUSTICE KELLY: Assuming a motion is filed.

MS. MENGEL: Yes.

JUSTICE KELLY: If we pass this we would effectively tell the world not to file such motions so there would be no opportunity for you to grant that particular accommodation.

MS. MENGEL: Yes, I suppose that's true, depending on how the practitioner looked at it. I think that at the time that case arose, there was a 56-day deadline on filing motions to reinstate and no particular suggesting anywhere in the rules that late ones would be entertained. What was filed was not actually filed under 7.217. It was filed under 7.216 as a request to ask the court to review the situation and grant the relief due to extraordinary circumstances.

JUSTICE YOUNG: Do you view this rule as eliminating the 7.216 route for review?

MS. MENGEL: I think there is debate about that among the members of our court. Some people would view that as jurisdictional. There are others who argue that we should be able to take those motions under 7.216 and review them. The clerk's office would not return those, those would go to either the administrative docket or a panel of three judges for judicial disposition.

JUSTICE WEAVER: How would that get decided if we pass this? (inaudible) the Court of Appeals (inaudible).

MS. MENGEL: Well I think in any event these cases are going to be decided on a case by case situation. If you repeal the rule that was put into effect until this hearing and there is no longer a statement in the court rules that we are unable to accept late motions, then we would still get potentially late motions that would go to a panel and they would decide whether to actually reinstate. I would assume that if a file came in with a motion under 7.216 which asks to have a case reinstated, the same basic decision would be made whether or not there is any merit to the underlying allegations as the basis for the failure to comply with the timelines.

JUSTICE CORRIGAN: How does this rule interface with the expedited program that we've just authorized? If we don't retain this amendment will it be a way as a strategic measure to blow up those deadlines?

MS. MENGEL: I don't see it that way. I think in those cases if a party misses a deadline for an appellate brief, for instance, under the summary disposition docket, they will first receive an order assessing costs and in that order there will be a direction for the brief to be filed within the original additional 14 days from the original deadline. After that it will be dismissed and there would be the 21-day rehearing. I think that certainly if this subsection of 7.217 is not retained the court would be viewing any motions to reinstate in any case but certainly in those summary disposition cases with additional scrutiny.

JUSTICE CORRIGAN: And since this rule went into effect, I guess it was on an emergency basis, how many late motions for reinstatement have you sent back?

MS. MENGEL: I don't have that number.

JUSTICE YOUNG: It light of your admission that this isn't a huge problem for you that means that it all depends on the logic of the symmetry argument which I frankly don't understand. I think Mr. Cooney made a pretty compelling logical argument that it's a pretty obvious reason why you don't necessarily entertain motions for rehearing because the case has actually been decided. But on the front end it doesn't seem quite so compelling. What is the basis, why does the Court of Appeals feels this is important?

MS. MENGEL: I think aside from the merits issue, which I will grant you, that's an interesting distinction to be made between those two types of motions. I think aside from that the sense is that in most of these cases it is not a new lawyer. We did go back and look and in 87% of the motions for reinstatement that are timely filed or that are filed at all, it's the same lawyer. And they're probably at the very end of the deadline period and to us it's just an indicator that they've just used one more period of time to their advantage.

JUSTICE CORRIGAN: Are these appellate practitioners who might be members of the appellate practice section who are filing these motions, since you've analyzed that 87% of them you know the identities of the lawyers.

MS. MENGEL: Well I did at one point look at the list of lawyers but it was a year or so ago when we first made this request and I haven't looked at it again recently. I have to assume some of them are members. The section has alleged (inaudible) management.

JUSTICE CORRIGAN: I know there are all these sort of practitioners who are one time only customers to your court and I'm just wondering how this cuts.

MS. MENGEL: That's true and I don't know the actual breakdown on that one. Are there other questions?

JUSTICE YOUNG: Just give me a guesstimate but what other magnitude are we talking about here. Are we talking about 25 a year?

MS. MENGEL: I would doubt that it was more than that. We have dismissed probably 600 and some cases in the last 5 1/2 years. We've had motions to reinstate in probably about 28% o those. So then the ones that would be late would

obviously a much smaller number. It's quite true, I'm not going to argue that there is a huge problem in this area.

JUSTICE KELLY: And you could come back with this request again should it be denied now, if it is a documented problem.

MS. MENGEL: That's true. Thank you.

ITEM 4: 2002-34, 2002-44 - RETENTION OF MCR 7.203 AMENDMENT

JUSTICE CAVANAGH: Item 4 deals with Admin 2002-34 and 2002-44 referencing whether the Court should retain the amendment of Rule 7.203 that implemented the Court of Appeals' summary disposition docket. The only individual I have endorsed for comment is Mr. Cooney again.

MR. COONEY: Thank you. Once again I'm speaking on behalf of the Appellate Practice Section. I have a confession to make. One of the reasons I signed up for this agenda item kind of late in the game is that I read the Court's statement, news release, regarding this hearing and it made it appear as if there was a possibility that there were going to be some wholesale additions to the actual court rule 7.203 and one of my reasons for coming was just to reassure myself that all we're talking about is the addition of subsection G which of course alerts practitioners that the administrative order is out there which sets forth the procedures for the fast track. We approve wholeheartedly of the addition of subsection G. We think it's very important that practitioners have something in the court rules. The litigators live and die by the book of court rules on their desk. That refers them to the administrative order that they might not otherwise know about so assuming that that's the only change that we're talking about and assuming that I was too quick to become alarmed looking at the press release, the section supports the addition of subsection G to that court rule.

JUSTICE CAVANAGH: Thank you Mr. Cooney. It's my understanding that is all that is before the Court.

ITEM 5: 2004-40 AMENDMENT OF MCR 3.215

JUSTICE CAVANAGH: Item 5 is Admin 2004-40, whether to adopt a proposed amendment of Rule 3.215 which would implement 2004 P.A. 210, redefining de novo hearings, and would allow trial courts to give interim effect to a referee's recommended order pending a hearing de novo. I have as being endorsed Mr. Kenneth Randall.

MR. RANDALL: Good morning. I'd like to thank the Court for giving me the opportunity to speak to you. I am Ken Randall and I am the president of the referee's

association. You're all probably familiar with referees. I know Justice Corrigan came to our conferences (inaudible). We are a group of approximately 100 referees from across the state, both probate court juvenile referees and Friend of the Court referees. I happen to be a Friend of the Court referee and I also have with me Mark Sherbow who is also with the Referee's Association who is co-chair of the court rules committee and he's going to speak next and he's going to answer your technical questions regarding this rule. I wanted to speak more broadly and I'll rely on the letter that was submitted by the Referee's Association. I will say there was much discussion, much debate among the referees in how to respond but the referees are taking this very seriously. Given the limited time that I do have to speak, the one section I do want to focus on is (G)(2) and that has to do with possible exceptions to immediate effect of interim order. And the recommendation from the Referee's Association is that whole section (G)(2) be stricken. That there not be a limitation put on any immediate effect. And there are a number of reasons for this and one reason, probably (inaudible) to start with but one reason is juvenile referees when they make a recommendation it has immediate effect. Why not then Friend of the Court referees? We're all talking about domestic relations issues. Issues of custody. Issues where children may or may not be in danger, but we're essentially looking at the best interests of the children?

JUSTICE CORRIGAN: Will you take questions, Referee Randall? Can I interrupt you right now?

MR. RANDALL: Go ahead.

JUSTICE CORRIGAN: Can we just clarify for one moment exactly what language it is that you want us to delete.

MR. RANDALL: What I have before me is (G)(2), the whole section, not just (2) but (a), (b), (c) and (d).

JUSTICE CORRIGAN: You want the whole thing stricken?

MR. RANDALL: The whole part 2.

JUSTICE CORRIGAN: Okay. Two questions. Would that be inconsistent with the statute the Legislature passed? And if that was done, would that jeopardize Title 4(D), funding?

MR. RANDALL: In terms of administration I don't know about the funding question. The statute question I'm not sure about the order for incarceration. What I have before me is the Public Act. I don't see that it is necessarily inconsistent with the two. And again I speak broadly, most important thing--there are really two things that I think are very important in family law. Domestic relations is such a unique area of law

anyway but there needs to be access to the courts. Anybody should be able to come in. Another thing is that there needs to be an immediacy of a resolution, especially in family law. It is a very volatile area. I was a prosecutor for six years and there's a lot more volatility in family law issues than there are with criminal issues.

JUSTICE CORRIGAN: Now let me just be clear on this. As I understand the federal law, if a referee's order had effect that would jeopardize federal funding because your orders are not allowed to have immediate effect, correct?

MR. RANDALL: That's the first time I've ever even heard that question so I don't know the answer to that.

JUSTICE CORRIGAN: Oh, you don't know that. That's what our research, the Court has been told, that the research shows that the federal statutes require that you not have permanency to your orders. That there has to be judicial review or it jeopardizes federal funding.

MR. RANDALL: I wish we had somebody from Focus here to talk about that because I hadn't heard about that. That would be an argument to see if we could get around it another way but in terms of immediate effect there are certainly compelling reasons why --

JUSTICE CORRIGAN: And the second is why doesn't that violate our own state Constitution if we give judicial power to you to issue orders that have immediate effect. Doesn't that violate the Master and Chancery provision of our Constitution.

MR. RANDALL: I don't think it does because you still have a right to object. And what we're trying to do is put out fires in the interim time pending--we're trying to set up some kind of ground rules going into, if there is an objection, to the objection hearing. I know I'm probably past my time. Referees are a very diverse group. I know you received quite a few comments on this court rule. We have circuit writing referees. We have referees who might hear a case for an hour. We have referees who have many trials and might hear something for days, so it's kind of hard to have one rule to kind of hamstring so if it's possible to delete that (G)(2) section also and give more authority back to the courts by administrative order in terms of how they think things should happen in their jurisdiction I think that would be wise. Thank you.

JUSTICE CAVANAGH: Thank you Mr. Randall. Mr. Mark Sherbow.

MR. SHERBOW: Good morning, Your Honors. Speaking to 3.215 I first want to say that I come to you as a member of the subcommittee that was working on this, the subcommittee of the joint rules committee SCAO. This was never intended to be

reported out. It was not done. We ported out certain portions of it to the committee as a whole. Both were taken. Cynthia Sherbourne who is the head of our committee asked Judge Eveland to return it to the subcommittee so we could work on it further and he said fine. In fact I've talked to him on more than one occasion and it was not his understanding that this was going to be reported out for publication nor was it our subcommittee's understanding. So this is a very incomplete work and we felt there was much more to be done. I sent a letter to Mr. Davis asking that it be re-referred to the committee rather than public hearings but I received a response saying that (inaudible). I think that this rule does more than address de novo hearings and it does more than address interim orders and to respond to your question, Justice Corrigan, I believe that it isn't a final order, it's an interim order and that's really the issue. There are some inconsistencies in the court rule that will create problems. Some of the response, for example, if someone objects to the order it can take immediate effect. If they don't object it can't. And there are many instances where there's a problem. Mr. Ferrier sent a letter where he suggested that this be referred to the committee again and that we have more family law practitioners and family court judges and referees, and I believe that people who do this kind of work on a day-to-day basis--

JUSTICE CORRIGAN: We've been through this before in our various discussions. Why does the Supreme Court have to assign a committee. Why can't the RAM have its own committee that sends us comments. Why does it have to be structured in the fashion that you're describing, from a process standpoint. We've got a statute out here that we've got to make our court rules conform to so if we're doing process for five years I don't get how we get things done.

MR. SHERBOW: Well when the statute went out the committee was established. I and Mark Anderson who is a family court judge and Bob Nyda and Zenell Brown and Sue Fisher, were all assigned and we were getting input from other people. We weren't done. But they reported out the bill. We would have been done; we needed two, maybe three more meetings, and we would have been happy to give you what we thought was a finished product. We were working on it but when it comes out like this my response is give us a chance, give the practitioners a chance. I personally believe the SCAO wanted it reported out so they did.

JUSTICE YOUNG: Excuse me. It has been interposed that the reasons for these provisions are two-fold. One they jeopardize federal funding. Do you have anything to say on that subject?

MR. SHERBOW: I don't believe that the rules as proposed do jeopardize federal funding.

JUSTICE YOUNG: No, no. Not as proposed. As RAM would have them revised. As published we are advised that they are protective of our federal funding. Do you have --

MR. SHERBOW: My opinion is that I don't have as detailed a knowledge as Justice Corrigan, however, we are not entering permanent orders. The only orders we would enter would be temporary pending a 20-day--

JUSTICE CORRIGAN: You can say that but you haven't lived through federal audits like I have, Mr. Sherbow. And they'll come in and they'll tell you that order does not meet our requirements for getting federal funding. And I don't mean I've got a clear-cut position on it. I'm just saying this is your area of expertise, well then you need to get involved in what the federal ramifications are and not leave it to one person at the State Court Administrator's Office to be the statewide expert.

MR. SHERBOW: Given the chance I will do so.

JUSTICE YOUNG: Let me just ask you the question. Do you have expertise and do you have a basis for telling us today whether the proposed changes you would make in the published rules would or would not jeopardize federal funding.

MR. SHERBOW: No, but I will tell you, Your Honor, that the expert that was assigned to our committee never raised this is an issue when these issues were being discussed.

JUSTICE YOUNG: That's one issue. The second issue is the constitutional question. Why do you think the proposal changes that your organization is recommending won't bring us perilously close to the Master and Chancery problem?

MR. SHERBOW: I don't think the changes we are proposing are substantially different than what is being practiced in many counties now.

JUSTICE YOUNG: Does that answer the question. What (inaudible) may or may not be acceptable constitutionally.

MR. SHERBOW: I think that everything I do is subject to review by my judge, either immediately or within an objection period. There is nothing that I do that becomes permanent without complete judicial review. I've been doing this for 10 years. I practiced law for 25 years beforehand, for many years before referees. And I have found that there are plenty of protections. I think the referee system was wonderful. As a practitioner I thought it was wonderful and as a referee I think it is good. I think all of the protections are there. I have never once felt deprived of access to judicial protection if it was needed. And I'll say immodestly for the referees, I don't know that I've ever needed it

that often. I rarely ever appealed a referee's decision and not many of mine are. But it is there and it is easy to get. I can't think of a county that I practiced in where the judges weren't readily available. Thank you for your time. Have a very good day.

JUSTICE CAVANAGH: Thank you Mr. Sherbow.

The next item is Item 6 - Adm 2004-11 relating to proposed amendment of Rule 6.445 relating to the advice a sentencing judge is to convey to a probationer. Is anybody here to address that? I don't have anybody endorsed for that so it will be submitted.

Item 7: 2003-65 MCR 6.425, 7.210, 8.119

JUSTICE CAVANAGH: Item 7 - Admin 2003-65 deals with proposed amendments of rules 6.425, 7.210 and 8.119 and that relates to recommendations of the Court of Appeals record production workgroup. I have one individual endorsed, again Mr. Cooney.

MR. COONEY: I appreciate the Court's time very much. Again I'm here on behalf of the Appellate Practice Section and the Section wants to go on record supporting these changes. To quote one of our council members, they're excellent and record production issues remain the most vexing issues that appellate practitioners face on a day-to-day basis so the Section wanted to publicly acknowledge and thank the Court of Appeals Record Production Workgroup for these good changes. Thank you.

JUSTICE CAVANAGH: Thank you Mr. Cooney. Court has received written comments from the Michigan Judges Association and from the State Bar of Michigan and we will consider those items in our deliberations. That concludes the administrative agenda for this public hearing. These matters will be taken under advisement by the Court. Is there any other matter that anybody present wishes to comment on relating to this agenda? All right, thank you all for coming. We will stand in recess.